

APPEAL NO. 042623
FILED DECEMBER 6, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on September 22, 2004. The hearing officer resolved the disputed issue by deciding that the Texas Workers' Compensation Commission (Commission) did not abuse its discretion in appointing a second designated doctor. The appellant (carrier) appealed, arguing that the hearing officer's decision should be reversed citing Advisory 2004-03, signed April 19, 2004, and Texas Workers' Compensation Commission Appeal No. 040633-s, decided May 7, 2004. The carrier additionally argues that neither the respondent's (claimant) condition nor treatment changed from the time of the appointment of the first designated doctor and the subsequent appointment of the second designated doctor. The claimant responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that on _____, the claimant sustained a compensable injury; that Dr. O is the first designated doctor appointed by the Commission; and that Dr. A is the second designated doctor appointed by the Commission. The record reflects that both Dr. O and Dr. A are medical doctors. At issue was whether the Commission abused its discretion in appointing a second designated doctor.

Dr. O initially certified that the claimant reached maximum medical improvement (MMI) on November 23, 2001, with a 10% impairment rating (IR) under Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides), based on Diagnosis-Related Estimate (DRE) Lumbosacral Category III. The hearing officer found that in responding to a letter of clarification, Dr. O requested a reexamination of the claimant to resolve a dispute raised by the claimant's treating doctor. The record reflects that the claimant has undergone both the implantation and removal of a spinal cord stimulator, in addition to various other treatment. We note however, that the removal of the spinal cord stimulator system occurred on April 20, 2004, well outside the date of statutory MMI.

Pursuant to Section 408.0041 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(d)(2) (Rule 130.5(d)(2)), the Commission is charged with the responsibility of ensuring that a designated doctor is still qualified before scheduling an appointment with the designated doctor to reexamine the claimant. Rule 130.5(d)(2) became effective on January 2, 2002, and does not provide exceptions for claims in progress prior to that time. Indeed, the wording of Rule 130.5(d)(2) contemplates using a previously selected designated doctor "if the doctor is still qualified." However, if the doctor is no longer

qualified and available, selection of a new designated doctor is mandated. See Texas Workers' Compensation Commission Appeal No. 022277, decided October 23, 2002.

Under Section 408.0041 and Rule 130.5(d)(2)(C), the Commission shall appoint a designated doctor who has credentials appropriate to the issue in question and be trained and experienced with the treatment and procedures used by the doctor treating the patient's medical condition, and whose scope of practice includes the treatment and procedures performed. In Appeal No. 040633-s, *supra*, we retreated from our decision in Texas Workers' Compensation Commission Appeal No. 030737-s, decided May 14, 2003, based upon Commission Advisory 2004-03 where the Executive Director stated that the "phrase 'scope of practice' as it is commonly used is synonymous with a doctor's licensure." In the instant case, the hearing officer found that the submitted matrix for the claimant submitted in 2002 was different from the matrix submitted in 2004 and attached to each Request for Designated Doctor (TWCC-32). The hearing officer additionally found that on February 4, 2004, the Commission determined that Dr. O no longer met the matrix submitted.

Appointment of a second designated doctor is reviewed under an abuse-of-discretion standard. Texas Workers' Compensation Commission Appeal No. 960454, decided April 17, 1996. An abuse of discretion occurs when a decision is made without reference to appropriate guiding rules or principles. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). Selection of a second designated doctor may be made where the first designated doctor will be unavailable for a period of time to conduct an additional examination. Texas Workers' Compensation Commission Appeal No. 042669-s, decided December 2, 2004. Selection of another designated doctor may also be upheld where the first doctor refuses to cooperate or to render a report consistent with the 1989 Act. Texas Workers' Compensation Commission Appeal No. 961228, decided August 8, 1996.

In this instance, the hearing officer determined that the Commission did not abuse its discretion in appointing a second designated doctor because Dr. O no longer met the matrix submitted by the claimant. After considering Advisory 2004-03 and its interpretation in Appeal No. 040633-s, *supra*, and cases following, we find that the hearing officer erred in finding that the Commission did not abuse its discretion in appointing a second designated doctor. See *also* Texas Workers' Compensation Commission Appeal No. 041530, decided August 16, 2004. We reverse that decision and render a new decision that the Commission did abuse its discretion in appointing a second designated doctor.

The true corporate name of the insurance carrier is **TRAVELERS INDEMNITY COMPANY OF CONNECTICUT** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL
DALLAS, TEXAS 75201.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge